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April 30, 2008

BY HAND

Ms. Marlene Dortch
Office of the Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

FILED/ACCEPTED
APR 30 2008
Federal Communications Commission
Office of the Secretary

Re: *Sacred Wind Communications, Inc., CC Docket No. 96-45*

Dear Ms. Dortch:

Sacred Wind Communications, Inc. ("Sacred Wind"), by its attorneys, hereby submits an original and four copies of its Petition for Expedited Extension of Waiver in the referenced docket.

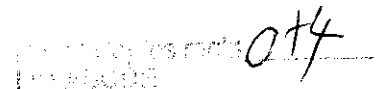
Please direct any questions regarding this submission to the undersigned.

Respectfully submitted,

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**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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In the Matter of)	
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SACRED WIND COMMUNICATIONS, INC.)	CC Docket No. 96-45
)	
Petition for Expedited Extension of Waiver of)	
Sections 36.611 and 36.612 of the)	
Commission's Rules)	

PETITION FOR EXPEDITED EXTENSION OF WAIVER

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Dated: April 29, 2008

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FEDERAL COMMUNICATIONS COMMISSION
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PETITION FOR EXPEDITED EXTENSION OF WAIVER

Sacred Wind Communications, Inc. ("SWC") respectfully requests, pursuant to Sections 0.91, 0.291, and 1.3¹ of the Commission's Rules, an expedited extension of the waiver of Sections 36.611 and 36.612 of the Commission's Rules² granted pursuant to the Wireline Competition Bureau's ("Bureau's") Order of August 15, 2006.³ Specifically, the Commission should extend the waiver of Sections 36.611 and 36.612 granted to SWC through and including December 2008 to ensure that immediate and sustained universal service support is provided to SWC's service area; to ensure that planned network upgrades remain substantially on schedule, thereby facilitating SWC's provision of service in unserved and underserved areas within its study area; and to avoid potential increases in local rates, which could have the effect of further

¹ 47 C.F.R. §§ 0.91, 0.291, and 1.3.

² 47 C.F.R. §§ 36.611 and 36.612.

³ *Sacred Wind Communications, Inc. and Qwest Corporation Joint Petition for Waiver of the Definition of "Study Area" Contained in Part 36, Appendix-Glossary of the Commission's Rules, Sacred Wind Communications Inc. related Waivers of Parts 36, 54, and 69 of the Commission's Rules*, CC Docket No. 96-45, Order, 21 FCC Rcd 9227 (Wir. Comp. Bur. 2006) ("SWC Order").

suppressing subscribership in Tribal and near-Tribal lands that already experience very low service penetration rates.⁴

I. BACKGROUND

On March 30, 2006, SWC filed a petition seeking, in part, a waiver of Sections 36.611 and 36.612 of the Commission's rules. In seeking relief from Sections 36.611 and 36.612, SWC sought to receive immediate access to high-cost loop support, an element of federal universal service support, based on SWC's projected costs (subject to true-up) as opposed to historical costs as provided in Sections 36.611 and 36.612.

Section 254(b) of the Communications Act of 1934, as amended (the "Act") provides that consumers in rural, insular and high-cost areas should have access to telecommunications services at rates "reasonably comparable to rates charged for similar services in urban areas."⁵ As the Bureau noted in the *SWC Order*, absent a waiver of these rules, a qualified carrier such as SWC would not receive high-cost loop support "until the beginning of the second calendar year after the costs are incurred."⁶ As a result, without the waiver of Sections 36.611 and 36.612, SWC would have had to recover all of its costs from its subscribers while waiting for necessary support. As the Bureau found in 2006, this action would "discourage subscription to local telephone service and jeopardize the provision of service in unserved and underserved remote areas."⁷ The Bureau further found in the *SWC Order* that, in the distinctive circumstances presented by SWC, a strict application of the rules "may not further the goals of section 254 of the [Act]."⁸

⁴ See *SWC Order*, ¶ 14.

⁵ 47 U.S.C. § 254(b).

⁶ *SWC Order*, ¶ 13 (footnote omitted).

⁷ *SWC Order*, ¶ 14 (footnote omitted).

⁸ *SWC Order*, ¶ 16

The Commission had previously granted such waivers, as it did in 2006 for SWC, to “accelerate the provision of support to cover costs incurred by new carriers initiating or extending service in unserved and underserved remote areas.”⁹ In the *SWC Order*, the Bureau acknowledged the extraordinarily low level of subscribership within SWC’s proposed service area and SWC’s commitment to increasing access to basic and advanced services in its service area.¹⁰ Citing evidence in SWC’s petition that SWC was prepared to bring to its service territory services comparable to those offered in urban areas at affordable rates and to significantly increase penetration throughout its service territory,¹¹ the Bureau determined in the *SWC Order* that “special circumstances warrant[ed] a deviation from sections 36.611 and 36.612 of the Commission’s rules, and that it [was] in the public interest to grant [SWC’s] waiver request”¹²

The Bureau, therefore, granted SWC a waiver of Sections 36.611 and 36.612 of its rules. SWC was directed, in conjunction with the relief the Bureau granted, “to submit quarterly updates of its actual costs in accordance with the Commission’s rules, so that it may be determined whether adjustments for the 2006 and 2007 high-cost loop support amounts are necessary.”¹³ The Bureau also directed that “[p]ayments for periods subsequent to December 2007 will be based on historic data in accordance with the Commission’s rules.”¹⁴

⁹ *SWC Order*, ¶ 15 (footnote omitted) (citing *Border to Border Communications, Inc., Petition for Waiver of Sections 36.611 and 36.612 of the Commission’s Rules*, Memorandum Opinion and Order, AAD 94-61, 10 FCC 5055, 5057, ¶ 514 (Com. Car. Bur. 1995) (“*Border to Border Communications*”)).

¹⁰ *SWC Order*, ¶ 8-9, 14. See also *Federal-State Joint Board on Universal Service*, Twelfth Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking, 15 FCC Rcd 12208, ¶ 5 (2000) (“*Twelfth Report and Order*”) (Native American communities “on average, have the lowest reported telephone subscribership level in the country”); U.S. Government Accountability Office, *Challenges to Assessing and Improving Telecommunications for Native Americans on Tribal Lands* 14 (2006) (“*GAO Tribal Lands Report*”).

¹¹ *SWC Order*, ¶ 14.

¹² *Id.*

¹³ *Id.* at ¶ 16.

¹⁴ *Id.* (emphasis added, footnotes omitted).

At the time SWC filed its petition seeking a waiver of Sections 36.611 and 36.612 of the Commission's rules, it had pro forma financial and construction projections based on its anticipation that it would begin provisioning services by shortly after the end of the first Quarter of 2006, permitting SWC to accrue approximately a year of historical costs on which high-cost loop payments could have been made after December 2007. Those projections had already been submitted to the New Mexico Public Regulation Commission and Rural Utilities Service ("RUS") in 2005 and were a part of its waiver application to the FCC. However, due in part to delays in closing the sale of lines to SWC, historical costs only accrued for fifteen days in 2006. Specifically, while the SWC/Qwest preliminary Letter of Agreement was signed on June 17, 2005, the due-diligence process (primarily obtaining essential network and revenue data from Qwest) was not completed until June, 2006. This delay was compounded in a delayed application to the RUS for a loan, which was necessary for SWC to begin operations and to upgrade its facilities. The delays in the closing of the sale and the RUS financing also delayed the New Mexico Commission's issuance of the SWC Certificate of Convenience and Necessity ("CCN"). SWC's loan was not approved until September 21, 2006, and SWC's CCN was not approved until December 15, 2006, at which point the parties closed the transaction.

Finally, the delays in financing and approvals were exacerbated by transactional and regulatory hurdles placed upon facilities deployment in relevant jurisdictions. After closing the purchase, SWC had a lengthy collocation negotiation with Qwest for the placement of certain facilities on Qwest's towers. Then, the tower and other facilities-siting activities that the Navajo Nation, the Bureau of Land Management ("BLM"), the Bureau of Indian Affairs ("BIA"), and McKinley County supervised took far longer than originally anticipated. Only then, beginning with a trickle in December 2006, and ramping up as approvals were obtained, did SWC incur costs and make substantial expenditures for the improvement of service in its new territory that would give rise to high cost loop support.

SWC, therefore, requires an extension of the waiver of Sections 36.611 and 36.612 granted in the *SWC Order* through calendar year 2008. If the terms of SWC's waiver are not extended, payments of high-cost loop support made after December 2007 will be based on costs significantly smaller than anticipated by either SWC or the Bureau when the waiver was granted, and the policies the Bureau's *SWC Order* promoted will be substantially undermined. Specifically, because the waiver extended by the *SWC Order* does not extend into 2008, the high-cost loop support stream has been significantly diminished, placing in jeopardy SWC's planned schedule of network deployment. The delays in network deployment the slowed support stream will cause will inevitably lead to a delayed roll-out of services to underserved Tribal and near-Tribal areas.

II. DISCUSSION

A. MERITS OF REQUEST FOR EXTENSION

SWC seeks to extend its waiver of Sections 36.611 and 36.612 by an additional year, to the end of 2008, when actual cost data will be available for the calculation of support. Section 1.3 of the Commission's Rules provides that "any provision of the Commission's rules may be waived by the Commission on its own motion or on petition if good cause therefore is shown."¹⁵ Under section 1.3, a petitioner must demonstrate that "special circumstances warrant a deviation from the general rule and that such a deviation will serve the public interest."¹⁶ The Commission's analysis may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis.¹⁷

The extension of SWC's waiver of Sections 36.611 and 36.612 would serve the public interest and would be consistent with determinations the Commission has made in similar cases

¹⁵ 47 U.S.C. §1.3.

¹⁶ See *SWC Order* at ¶4

¹⁷ *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990); *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969).

in the recent past. A carrier operating in ordinary course under the Commission's Section 36.611 and 36.612 historical cost rules receives payments of high-cost loop support based on full years of costs and investment. The terms of SWC's waiver adhere to this general rule, and the *SWC Order* provides that payments of high-cost loop support to be made to SWC after December 2007 are to be based on historical, actual data, rather than estimated costs. However, the underlying premise of the petition for the *SWC Order* -- that a full year (or a substantially full year) of costs would underlie the calculations of high-cost loop support provided in the Commission's Rules -- proved incorrect.

Due to the delay in closing the sale of Qwest assets; extended Bureau of Indian Affairs ("BIA"), Bureau of Land Management ("BLM"), and county processes for approval of permits; and complex environmental and archeological assessments, all of which necessarily preceded the deployment of infrastructure, only 15 days of network costs were incurred in calendar year 2006. The processes that resulted in the delays have either been completed or streamlined with the cooperation of the necessary agencies, but currently, only six percent of SWC's planned network is built out. Throughout 2007, and continuing into 2008 and 2009, SWC has made and will continue to make key investments in its network to order to serve the 3,200 square miles of its service area. As it proposed at the time of the original request for waiver, SWC anticipates completion of the planned network in 2011. However, under the terms of the *SWC Order* and the specific circumstances presented here, payments made in 2008 to SWC would be based on only 15 days of costs and investment made in 2006.

As is shown herein, none of the facts demonstrating that the initial waiver was in the public interest have changed materially since the approval of the Bureau's *SWC Order*. As was the case at the time of the *SWC Order*, the proposed and continuing investment in infrastructure is critical if SWC is to bring universal service to its remote service area. While improving, SWC's service area continues to be among the most underserved areas in the nation. The

telephone penetration rate within the service area was estimated to be twenty-eight percent when SWC first came to the Bureau in 2006.¹⁸ After surveying the SWC service area thoroughly and finding very remote, but populated, areas that are without service, SWC estimates that the actual telephone penetration rate within its area is as low as 22 percent. As SWC pointed out in its initial petition in 2006, the sheer geographic expanse of the study area, the low relative population density of the area, and the difficulties in obtaining easements or rights-of-way for construction and maintenance of the needed facilities have been as inhospitable to network deployment as predicted. And, regulatory hurdles established by various federal, state, and local agencies have substantially slowed construction. Nevertheless, with an appropriate level of universal service support for a sufficient time, SWC estimates that it can deploy the infrastructure necessary to increase the penetration rate in its area to as much as 90 percent.

Conversely, if an extension of the waiver is not granted, but SWC is to continue a swiftly-paced deployment, SWC would be required to look to its customers for any shortfall in the revenue required to provide service in its remote service area and any lost or diminished high-cost loop payments. At the same time, SWC would be hard-pressed to make up any revenues from its local rates. As SWC demonstrated in seeking the *SWC Order*, SWC's customer base has an unusually high percentage of low-income consumers. In the 2006 *SWC Order*, the Bureau noted the high poverty and unemployment levels in SWC's service area¹⁹ and granted SWC a waiver that allowed the offering of Enhanced Lifeline and Link-Up throughout the area.²⁰ The Enhanced Lifeline and Link-Up programs have proven to be a resounding success in SWC's service area: SWC has increased its customers' participation in those programs from two percent of its subscriber base at the time of its acquisition to more than forty

¹⁸ SWC Petition for Waiver at 2.

¹⁹ *SWC Order*, ¶ 33.

²⁰ *SWC Order*, ¶ 35.

percent of its customers today. SWC remains committed to increasing the quality of basic and advanced services provided to the Navajo Nation in Tribal and near-Tribal lands, increasing the penetration rate in its service area, and ensuring that such services are provided at affordable rates. All of these goals are advanced by the requested waiver and obstructed by any loss of reasonable universal service support.

The Bureau recently granted an extension of a waiver of Sections 36.611 and 36.612 of its rules.²¹ Under circumstances strikingly similar to those that SWC presents, the Bureau found that it was in the public interest to extend a waiver for a reasonable time until historical costs became available.²² Specifically, the Bureau noted, “For the same reasons we found in the *Adak Order* that special circumstances warrant a waiver of section 36.611 and 36.612 of the Commission’s rules, we find it is in the public interest to extend the timing of that waiver to permit [the petitioner] to receive high-cost loop support based on projected costs in 2006 and 2007, until its historical costs become available in 2008.”²³ The Bureau further determined that “an interruption in [petitioner’s] high-cost loop support would impair its ability to provide telecommunications services at affordable rates, and that such interruption would not further the goals of section 254 of the Communications Act of 1934, as amended.”²⁴ The Bureau’s rationale in *Adak II* holds true in this case, as well, and the Bureau should grant the requested extension of the waiver.

B. RATIONALE FOR EXPEDITED CONSIDERATION

SWC is dependent upon the appropriate level of high-cost loop support for the expeditious construction of the network upgrades required to serve its customers in Tribal and

²¹ *Adak Eagle Enterprises, LLC d/b/a Adak Telephone Utility Petition for Waiver of Sections 36.611, 36.612, 54.301(b), 54.314(d), 54.903(a)(3), 69.2(hh) and 69.3(e)(6) of the Commission’s Rules*, CC Docket No. 96-45, Order, 21 FCC Rcd 13746 (Wireline Compet. Bur. 2006) (“*Adak II*”)

²² *Adak II*, ¶ 5.

²³ *Id.*

²⁴ *Id.*

near-Tribal lands. Without timely high-cost loop support payments, SWC's cash flow will prevent it from pursuing its construction schedule as planned, because it will be unable to purchase materials and hire contractors for many of its construction projects. Instead, SWC will find itself in a position where it will be required to resort to the purchase-order system of its RUS financings for the materials and labor it requires. While the loan proceeds are available, the RUS process has proven somewhat incompatible with the maintenance of a consistent and rapid construction schedule, and is no substitute for high-cost loop support. Without the support SWC anticipated, it will be difficult for SWC to complete construction objectives and meet customers' expectations. The result will be an unnecessary delay in the extension of new telecommunications services to unserved and underserved customers on Navajo lands. Good cause exists, therefore, for expedited treatment of SWC's petition for expedited extension of its waiver.

III. CONCLUSION

The rationale presented to the Commission in 2006 and upon which the Commission granted SWC's waiver is still relevant to an extension of that waiver. SWC simply cannot provide service throughout its service area without federal support. Further, it is imperative that such support remain adequate in order to provide telecommunications services at reasonably comparable rates as provided by the Act. Finally, the public interest is not harmed, but in fact is promoted, by an extension of SWC's waiver. Considering the long-neglected area that SWC now seeks to serve, the public interest can only be advanced by the grant of this request. Therefore, SWC respectfully requests the Commission extend the waiver of sections 36.611 and 36.612 of the Commission's rules granted in the *SWC Order* and direct that payments of high-cost loop support to SWC through December 2008 be based on projected costs.

Respectfully submitted,

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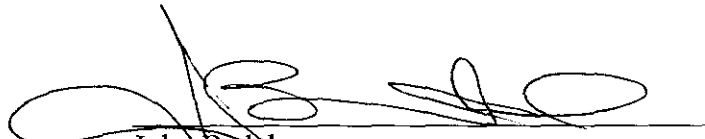
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Dated: April 29, 2008

VERIFICATION

I, John Badal, Chief Executive Officer of Sacred Wind Communications, Inc., declare under penalty of perjury that the facts stated in the foregoing Petition for Extension of Waiver are true and correct to the best of my knowledge, information and belief:

Date: April 29, 2008



John Badal